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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LOUIS E. OLIVERO, Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

ON APPEAL FROM THE
ILLINOIS SUPREME COURT

BRIEF OPPOSING MOTION TO DISMISS AND TO DENY ALTERNATIVE RELIEF

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Appellee, PEOPLE OF THE STATE OF ILLINOIS, assert that issues concerning the constitutionality of Illinois Supreme Court Rule 413 have been waived by

the appellant. In fact, the constitutionality of that rule was addressed by appellant in argument before the trial court. The effect of Rule 413 disclosure by the defendant in the case at bar led to the further violation of defendant Paul Powers' Fifth and Fourteenth Amendment rights by the State's Attorney's abuse of the grand jury process.

The constitutionality of Rule 413 was questioned by appellant at an early stage of these proceedings, before the trial judge found him in contempt. Appellant's actions which led to the trial judge citing him for contempt of court can only be understood by reference to appellant's position which he consistently maintained in the proceedings below, that Rule 413 is an unconstitutional usurpation of defendant's Fifth and Fourteenth Amendment

rights.

It appears that appellee chooses to rely solely on its waiver argument with respect to issues of the constitutionality of Illinois Supreme Court Rule 413, and appellee concedes, since it makes no argument in opposition, that Rule 413 is a "statute" for purposes of invoking the United States Supreme Court's jurisdiction under 28 U.S.C. 1257 (2). Appellee also makes no response to appellant's point that the judgment below is final for purposes of review by this tribunal.

Appellee would divert this court's attention to issues having no significance to the instant appeal, e.g., whether and under what circumstances Illinois procedure allows interlocutory appeals, and whether in the ordinary course, a trial court's orders must be obeyed.

Appellant submits that the question of paramount importance is whether an attorney may be held in contempt for undertaking a good faith attempt to protect and foster his defendant-client's Fifth and Fourteenth Amendment rights regardless of whether his position is ultimately held to be correct under the law.

An inseparable adjunct to that inquiry is whether citing an attorney for contempt of court because of his good faith assertion of his client's Fifth and Fourteenth Amendment rights offends against rights guaranteed the attorney by the Fifth and Fourteenth Amendments to the United States Constitution. Appellant asserts that the answer to the first of these intrinsically related questions is negative and that the answer to the second is af-

firmative.

The centerpiece of appellee's motion to dismiss is its citation of Maness v. Meyers, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975). However, although certain points are cited out of context from the Maness opinion by appellee, perusal of the entire Maness opinion leaves the reader with the unshakeable conviction that that decision supports appellant's, rather than appellee's position.

As in Maness, appellant Olivero was faced with the threat of imminent and irreparable harm to his client's Fifth and Fourteenth Amendment rights. That is, had defendant and his attorney proceeded to trial below, the State's Attorney would have had the use of what amounted to a pre-trial discovery deposition taken from an important defense

witness precipitately before trial. The taking of such a pre-trial discovery deposition and its impending use at trial in violation of defendant's Fifth and Fourteenth Amendment rights threatened to afford a decided tactical advantage to the State at trial.

Despite statements to the contrary in the opinion of the Third District Appellate Court of Illinois, an order in limine would not have cured the threatened prejudice and irreparable harm to defendant's Fifth and Fourteenth Amendment rights. Defendant's counsel feared that the State's Attorney's taking a pre-trial discovery deposition from one of the defense's important witnesses could effectively deprive the defense of any meaningful use of that witness' testimony at trial. That is so because the State's Attorney had obtained a

useful tool for impeachment, i.e., the transcribed grand jury testimony of Nina Errio.

The existence and use of that transcript would be likely to shift the tactical advantage of trial to the State. The trial court had indicated that it saw nothing improper about the State's Attorney's use of the grand jury, so that no order in limine was likely to be forthcoming. Furthermore, defense counsel had no corresponding power to depose key State witnesses. Trial was imminent, and in the good faith belief that the foregoing facts constituted an appropriate instance for the Appellate Court to assume jurisdiction of the controversy, appellant chose to place himself in peril of a contempt citation rather than jeopardize his client's constitutional rights.

The Maness v. Meyers opinion cites In re Watts, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903) at 419 U.S. 467:

> "In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule." (190 U.S. 29, 23 S.Ct. 725). (Emphasis Supplied.)

Watts involved the contempt citations of lawyers who had advised their clients that state, not federal, courts had bankruptcy jurisdiction over property in the hands of a receiver. The lawyers' advice was found to be incorrect, but there was no evidence of bad faith chargeable to the attorneys.

Most of appellee's brief in support of their motion to dismiss is taken up

with whether appellant's taking an interlocutory appeal was a correct procedural step under Illinois law. That argument misses the point, since the relevant inquiry is whether that step, even if incorrect, was taken by appellant in bad faith. There is absolutely no evidence whatsoever of bad faith on the part of appellant. Therefore, the rule of In re Watts controls and appellant cannot be guilty of contempt of court.

Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed. 897, cited by appellee, supports appellant's position rather than appellee's in another respect, namely, that appellant's conviction for contempt of court cannot stand because he was not afforded fundamental due process of law before being found guilty of contempt. Taylor v. Hayes

states at 418 U.S. 498 as follows:

> "Our decisions establish that summary punishment [for contempt] need not always be imposed during trial if its [sic] is to be permitted at all. In proper circumstances, particularly where the offender is a lawyer representing a client on trial, it may be postponed until the conclusion of the proceedings. Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952); cf. Mayberry v. Pennsylvania, 400 U.S. 455, 463, 91 S.Ct. 499, 504, 27 L.Ed.2d 532 (1971). But Sacher noted that '[s]ummary punishment always, and rightly, is regarded with disfavor . . .' 343 U.S. at 8, 72 S.Ct. at 454. '[W]e have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" Groppi v. Leslie, 404 U.S. 496, 502, 92 S.Ct. 582, 586, 30 L.Ed.2d 632 (1972), quoting In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948)."

At pages 498 and 499, the Taylor v. Hayes opinion continues as follows:

"Groppi counsels that before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." (Emphasis Supplied.)

And again at page 500:

"These procedures are essential in view of the heightened potential for abuse posed by the contempt power. Bloom v. Illinois, 391 U.S., at 202, 88 S.Ct., at 1482; Sacher v. United States, 343 U.S., at 12, 72 S.Ct., at 456. The provision of fundamental due process protections for contemnors accords with our historic notions of elementary fairness. While we have no desire 'to imprison the discretion of judges within rigid mechanical rules,' Offutt v. United States, 348 U.S., at 15, 75 S.Ct., at 14, we remain unpersuaded that 'the additional time and expense possible involved . . . will seriously handicap the effective functioning of the courts.' Bloom v. Illinois, supra, 391 U.S. at 208-209, 88 S.Ct. at 1486. Due process cannot be measured in minutes and hours or dollars and cents." (Emphasis Supplied.)

Having observed that the minimal requirements of due process were not provided to petitioner in Taylor v. Hayes, this court set aside that contempt judgment.

It is obvious that in the case at bar the trial judge afforded absolutely no opportunity for appellant to answer in his own behalf or be notified of the charges against him before sentencing him for contempt of court. All of the proceedings in the case at bar were in chambers and not during trial. This discussion took place during the pretrial proceedings. The trial judge entered his order finding the appellant in contempt of court and set the fine at $1,009.00. The trial judge never reduced the fine to $500.00. It is the position of the appellant tht the Appellate Court cannot reduce the fine to

$500.00 after the fact. The trial court's rush to judgment in condemning appellant for contempt of court and imposing a fine well above the limits of a penalty imposed for petty offense under Illinois law, (see Illinois Revised Statutes, Chapter 38, Sections 1005-9-1, a 4 and 1005-1-17) violated appellant's right to procedural due process of law guaranteed him by the Fourteenth Amendment.

Illinois authority holds that an attorney's efforts to zealously represent his client's interest should not ordinarily give rise to a citation for contempt. People v. Knuppel, 65 Ill. App.3d 1022, 22 Ill.Dec. 768, 383 N.E.2d 244.

Appellant filed an interlocutory appeal relying on Illinois authority and persuasive authority from the Seventh

Circuit Court of Appeals. City of Chicago v. Meyers, 37 Ill.2d 470, 227 N.E.2d 760, states at page 761 of the Northeastern Reporter Second Series as follows:

> "The jurisdiction of the appellate court attaches upon the proper filing of a notice of appeal. Thereafter, excepting certain instances not here concerned, the cause is beyond the jurisdiction of the trial court." (Emphasis Supplied.)

Appellant took the position that after the filing of a notice of appeal proper in form, the trial court lost jurisdiction, and in any event could make no order in derogation of the jurisdiction of the Third District Appellate Court of Illinois. It was appellant's position that until the Third District Appellate Court dismissed the notice of appeal, the matter appealed was properly before the Third Dis-

trict Appellate Court of Illinois and not the trial court. The trial court had no jurisdiction to enter orders which could moot the question appealed. That is, it is not for any trial court to decide whether a notice of appeal properly vests jurisdiction in the Appellate Court. It was equally improper for the trial court to order appellant to trial when an interlocutory appeal was pending before the Third District Appellate Court of Illinois.

By proceeding to trial, appellant would waive the issues raised in his appeal and the appeal would become moot. It must be remembered that the State of Illinois in Appellate Court No. 3-83-0538 (the appeal filed on August 26, 1983) filed an affidavit, a verified motion to dismiss, objection to the defendant's application to stay proceed-

ings, an affidavit of Court Reporter Janice M. Donnelly, and thereafter litigated at the appellate forum whether an interlocutory appeal was properly taken.

The trial court by ordering appellant to trial despite the pendency of his appeal in the Appellate Court No. 3-83-0538 usurped the jurisdiction of the Third District Appellate Court of Illinois, thereby confronting appellant with the Hobson's choice of whether to waive the issues presented for appeal or in the alternative to resist the trial court's order to proceed to trial and risk a citation for contempt. Appellant chose the latter course rather than compromise his client's rights.

By ordering appellant to trial when his appeal was pending, the trial court implicitly rejected all of the constitu-

tional arguments which had been posed in appellant's application to stay proceedings addressed to the trial court and the Third District Appellate Court of Illinois. These included the arguments that should the trial proceed, defendant would be denied a fair trial, denied equal protection of the law, deprived of liberty without due process of law and deprived as well of the fundamental fairness guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. Therefore, appellee's argument that constitutional questions have been waived in the reviewing courts below is totally without merit.

In his application to stay proceedings, in addition to citing City of Chicago v. Meyers, appellant cited Mara v. United States, 454 F.2d 588 (7th Cir.,

1971), reversed on other grounds United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99, holding that it is an abuse of the grand jury process to use it as a means of discovering information which can be discovered through the normal investigative process. In the Third District Appellate Court and in his petition for appeal as a matter of right to the Illinois Supreme Court, appellant cited In re November, 1979 Grand Jury, 616 F.2d 1021 (7th Cir., 1980). In re November, 1979 Grand Jury, cited Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, _____, which provided for an appeal by persons subpoenaed to testify before the grand jury about potentially privileged matters but who themselves were not persons within the privilege. In order to avoid such person being faced with

the difficult choice of testifying or risking a contempt citation, the United States Supreme Court allowed them to challenge the subpoenas on appeal. The Seventh Circuit Court of Appeals in In re November, 1979 Grand Jury applied the Perlman exception in order to provide flexibility on the question of interlocutory appeal.

As appellant argued below, there is Illinois precedent for interlocutory appeals by defendants in criminal cases. People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, involved the contempt citation of a defense attorney who refused to produce information pursuant to a pre-trial discovery order. The criminal trial was stayed so as to enable the defense attorney to appeal his conviction for contempt.

Illinois Supreme Court Rule 606

provides in pertinent part as follows:

> "No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional."

For all of the foregoing reasons, appellant's position in the trial court that jurisdiction had shifted to the Third District Appellate Court upon his filing a notice of appeal and that therefore he could not properly be ordered to commence trial, finds ample support in Illinois Supreme Court Rules and Illinois case law as well as persuasive federal authority. Since appellant's arguments in the trial court were steeped in authority, sincerely held, and since in addition there was a threat of irreparable harm to defendant's rights should the case proceed to trial, there is obviously such a showing of good faith on the part of appellant that

his contempt conviction cannot stand.

CONCLUSION

No constitutional issues raised in appellant's jurisdictional statement were waived in the courts below. According to the very authorities cited by appellees, appellant's citation for contempt cannot stand since he was denied fundamental due process of law. Appellant's behavior in the trial court represents good faith zealous advocacy which should not be penalized as contempt. Therefore, appellant's contempt conviction should be reversed.

Respectfully submitted,

LOUIS E. OLIVERO

TABLE OF AUTHORITIES

City of Chicago v. Meyers, 37 Ill.2d 470, 227 N.E.2d 760, pages 14, 17.

People v. Knuppel, 65 Ill.App.3d 1022, 22 Ill.Dec. 768, 383 N.E.2d 244, page 13.

Maness v. Meyers, 419 U.S. 449, 955 S.Ct. 584, 42 L.Ed.2d 574 (1975), page 5.

Mara v. United States, 454 F.2d 588 (7th Circ., 1971) reversed on other grounds United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99, pages 17, 18.

Perlman v. United States, 247 U.S. 7, 38 S.Ct. 417, ____, pages 18, 19.

In re November, 1979 Grand Jury, 616 F.2d 1021 (7th Cir., 1980), pages 18, 19.

Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897, pages 9 - 11.

In re Watts, 190 U.S. 1, 23 S.Ct. 718, 47 L.Ed. 933 (1903), pages 8, 9.

People v. Williams, 87 Ill.2d 161, 429 N.E.2d 487, page 19.

Fifth Amendment to the Constitution of the United States, pages 2, 4, 5, 6, 17.

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Fourteenth Amendment to the Constitution of the United States, pages 2, 4, 5, 6, 13, 17.

28 U.S.C. 1257 (2), page 3.

Illinois Supreme Court Rule 413, pages 1, 2, 3.

Illinois Supreme Court Rule 606, pages 19, 20.

Illinois Revised Statutes, Chapter 38, Sections 1005-9-1(a)(4) and 1005-1-17, page 13.